

THE CITIES OF AURORA AND COLORADO SPRINGS, COLORADO

IBLA 75-1

Decided November 18, 1974

Appeal from decision of Colorado State Office, Bureau of Land Management, suspending appellants' construction rights on rights-of-way C-08843, C-016262, C-016468.

Vacated and remanded.

1. Rights-of-Way: Generally – Rights-of-Way: Act of February 1, 1905 –  
Rights-of-Way: Cancellation

Suspension of the right to construct facilities on rights-of-way granted pursuant to the Act of February 1, 1905, 16 U.S.C. § 524 (1970), is tantamount to cancellation of the rights-of-way. Such rights-of-way may be canceled only after notice and an opportunity for a hearing have been afforded the holders of the rights-of-way.

2. Rights-of-Way: Generally – Rights-of-Way: Act of February 1, 1905 –  
Rights-of-Way: Cancellation

While rights-of-way granted pursuant to the Act of February 1, 1905, 16 U.S.C. § 524 (1970), are subject to cancellation if construction of facilities has not been completed within five years, such rights-of-way should not be canceled if the nature of the project requires an extensive period of time for its completion and that completion has been diligently pursued.

APPEARANCES: Louis Johnson, Esq., Leland Coulter, Esq. for appellants; W. J. Lucas, Regional Forester, for the Forest Service.

#### OPINION BY ADMINISTRATIVE JUDGE STUEBING

The Cities of Aurora and Colorado Springs, Colorado, have appealed from the June 3, 1974, decision of the Colorado State Office, Bureau of Land Management (BLM), suspending their right to construct facilities for the transmission of water on rights-of-way C-08843, C-016262, and C-016468. All of the rights-of-way are located within national forests in Colorado. The rights-of-way were acquired by the cities by assignment in 1962. The assignments were approved by this Department by decision of January 29, 1963, subject to stipulations requested by the Forest Service. One of the express conditions imposed by the BLM in approving the assignment was the requirement that the cities file proof of construction within five years of approval of the assignment, failing which, the rights-of-way would become subject to cancellation.

According to annual reports submitted by the cities to the BLM beginning in 1968, no construction had taken place on the rights-of-way involved due to the nature of the project. The project is to be completed in two phases, as continuing rapid growth of the cities creates increased demand for water. Construction of the first phase of the project has been completed. Actual construction of the second phase, which would utilize the rights-of-way in question, has not begun. Appellants assert, however, that engineering, environmental, and construction studies have been proceeding apace in anticipation of actual construction of the second phase of the project. Appellants also assert that the portion of the cost of the continuing studies allocable to each right-of-way is substantial. Appellants argue that their construction right should not be suspended, both because they have pursued the project with due diligence and because of the great financial harm that would result.

[1] It is apparent that suspension of the right to construct additional facilities is tantamount to cancellation of the right-of-way, as the essence of the right-of-way is the right to construct facilities thereon. The BLM Manual specifically provides that rights-of-way granted pursuant to the Act of February 1, 1905, 16 U.S.C. § 524 (1970), shall be canceled only as the result of

contest proceedings. V BLM Manual 3.8.50 (October 16, 1964). For that reason alone the BLM decision is nugatory. 1/

[2] Moreover, even though the pertinent regulation, 43 CFR 2802.2-3, seems to suggest that rights-of-way may be canceled solely for failure to construct facilities thereon within a five-year period, such conclusion is not tenable in every case. The Act of February 1, 1905, 16 U.S.C. § 524 (1970), provides no time limit for the construction of facilities on rights-of-way. The regulation, 43 CFR 2802.2-3, provides only that such rights-of-way are subject to cancellation for failure to construct facilities within a five-year period. The purpose of the five-year limitation is simply to aid the BLM and the Forest Service in proper administration of the lands by preventing holders of such rights-of-way from permanently interfering with other legitimate uses of the land. If, in fact, those who hold such rights-of-way have not diligently pursued the completion of their projects, their rights-of-way should be canceled, after notice and an opportunity for a hearing. Some projects, however, require a great deal of advance planning and an extensive period of time before they may be brought to fruition. If those projects are pursued with due diligence, it would be capricious to cancel rights-of-way required for completion of the project. To determine whether such projects have been pursued with due diligence, the Forest Service may, in appropriate cases, request that contest proceedings be initiated.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1,

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1/ Our conclusion that such a right-of-way may be canceled [Illegible Word] after due notice and opportunity for hearing is based solely [Illegible Word] the prescribed internal procedures of the BLM. We do not decide the question of whether a right-of-way granted pursuant to the [Illegible Word] of February 1, 1905, is an interest which falls within the [Illegible Word] of the adjudicatory procedures required by the Administrative [Illegible Word] Act, 5 U.S.C. § 554 (1970). Nevertheless, we note that an appellate decision the Director of the Bureau of Land [Illegible Word] held that the hearing must be conducted in accordance with the applicable provisions of the Administrative Procedure Act. H. Schundler, Sr., Buffalo Placer Corp., Denver 029057 (October 14, 1958).

decision appealed from is vacated and remanded for proceedings consistent with the opinions expressed herein.

Edward W. Stuebing  
Administrative Judge

We concur.

Douglas E. Henriques  
Administrative Judge

Frederick Fishman  
Administrative Judge

